

ADVOCATES FOR COMMUNITY AND ENVIRONMENT

Empowering Local Communities to Protect the Environment and their Traditional Ways of Life

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March 16, 2010

Jason King, P.E., Acting State Engineer
Nevada Division of Water Resources
901 South Stewart St., Suite 2002
Carson City, NV 89701

Re: March 16 Workshop on Great Basin Water Network v. Taylor

Dear Mr. King:

I am writing on behalf of the Great Basin Water Network and other petitioners in *Great Basin Water Network v. Taylor* (collectively "GBWN") in connection with the March 16 Workshop on the Nevada Supreme Court's Opinion in that case, to provide you with GBWN's views regarding the proposal to pursue legislative or State Engineer action designed to alter the effects of the Supreme Court's holding in that case. GBWN believes that this initial workshop will be a worthwhile opportunity to begin identifying and considering the different positions various interested parties have concerning the Supreme Court's ruling. In order to genuinely account for and address those varying concerns and positions, and to realistically seek any consensus on how to respond to that ruling, we believe that it will be necessary to hold additional workshops and to provide an opportunity for interested parties who are unable to participate in person to submit written comments during the period of consideration of these issues.

Legislative or Administrative Action Designed to Undermine the Opinion in Great Basin Water Network v. Taylor is Unnecessary and Would Be Inappropriate:

The Supreme Court's decision in *Great Basin Water Network v. Taylor* is sound and should stand as written. There is no need for the Legislature to interfere. Far from portending chaos in Nevada water law, as some have argued, the decision readily may be limited to the specific facts before the Court, and to the very limited number of instances that may present closely analogous factual circumstances. Further, the Court presently is considering both SNWA's and the State Engineer's petitions for rehearing, and may use this opportunity to provide any genuinely warranted clarification or limitation of the scope of its ruling in the case. During at least the pendency of the Supreme Court's consideration of those petitions and potentially any rehearing, legislative interference would be patently premature. Such a premature invasion of one branch of government's province by another would only lead to additional litigation and legal uncertainty, especially since the Court's decision expressly was premised in part on fundamental due process concerns that cannot be legislated away.

The Supreme Court's Ruling Will Not Impact Other Existing Rights and Would Only Affect a Very Limited Number of Extraordinary Pending Applications or Existing Rights:

The Court's opinion in *GBWN v. Taylor* was informed by and turned on the extraordinary circumstances surrounding the 1989 water rights applications for SNWA's massive proposed Pipeline Project into rural Nevada. Indeed, the Court pointedly laid out the unique facts involved in this case at some length, basing its decision largely on the length of time that the applications had been pending, the massive quantity of water they involve, the fact that an unprecedented interbasin transfer is involved, the magnitude of the potential impacts, the scale and scope of the opposition and controversy generated by SNWA's applications, and the fact that so many of Nevada's citizens had been shut out of the process. The Court crafted its ruling in this case in specific relation to the particular problems raised by these facts, and the ruling seems likely to be construed narrowly by the courts and the State Engineer to apply only to these applications and, potentially, an extremely limited number of large-scale, protested, interbasin transfer applications that present similar extraordinary facts.

By Its Own Terms the Ruling Will Not Affect the Seniority of Pending Applications or Existing Permits:

Some people have claimed that the Supreme Court's recent ruling will erase the seniority of all long-pending water rights applications in Nevada and may affect already permitted rights, creating chaos at the State Engineer's Office. That claim is unfounded and, in fact, is contradicted by the language in the ruling. After concluding that in this particular, and obviously extraordinary, case the protest hearing process needed to be re-opened, the Court expressly refused to rule that the old applications could not still move forward because that "would be inequitable to SNWA and future similarly situated applicants." *Great Basin Water Network v. Taylor*, 126 Nev. Advance Opinion 2, at 15 (January 28, 2010). Plainly rejecting an outcome that would destroy the seniority of SNWA's old applications, the Court clearly stated that "applicants cannot be punished for the State Engineer's failure to follow his statutory duty." *Id.*

So, there is no validity to the claim that the ruling will jeopardize the seniority of anyone's water rights applications or the validity of permitted rights. That claim is directly at odds with the actual language of the Supreme Court's ruling, and thus seems to be nothing more than an empty threat being spread by special interests who have other reasons for wanting to attack the ruling. Given the limiting guidance provided by the Supreme Court, there is no need for the legislature to place additional limitations on the decision.

The Court Should Be Allowed To Complete Its Consideration of These Issues:

To the extent that there is genuine ambiguity and legitimate concern as to the breadth of scope of the Court's ruling in this case, that issue already has been presented to the Supreme Court by the State Engineer in his petition for rehearing. Thus, the Court currently is considering whether any additional clarification or limitation of scope is called for in its ruling. The principle of separation of powers requires the Legislature to allow the Judiciary to complete its process of construing the law and ensuring consistency with constitutional requirements.

Legislative Action Cannot Eliminate the Constitutional Deficiencies in This Case:

As noted above, the Court expressly noted that given the procedural failures in this particular case a different legislative outcome still would present insurmountable constitutional due process problems. Given the fundamental underlying procedural deficiencies in this case, the Legislature simply cannot override the ruling in this case by changing statutory language. Fundamental constitutional violations cannot be legislated away, and an effort to do so would only lead to additional litigation with even more far reaching and problematic implications for Nevada. The legislature acknowledged as much in its Motion to Express Legislative Intent. Thus, any limitation placed on the Supreme Court's decision must be narrowly focused.

Parameters for Acceptable Potential Legislative Action:

Given the ongoing judicial consideration of the issues highlighted by the Legislature's Motion and addressed in this workshop, GBWN strongly believes that there is no current need for any legislative action that would intrude on the Judiciary's resolution of these issues. The Supreme Court will rule on the petitions for rehearing in the near future, and any remand to determine the precise contours of the appropriate remedy in the particular case at bar likely will be concluded within the following few months. Certainly, the courts will finish resolving the issues presented by the Supreme Court's ruling in this case within this year.

If, when the courts have resolved the issues raised about the scope of the ruling and the appropriate remedy in the case at bar, there still is any genuine remaining ambiguity concerning the ruling's scope and any legitimate concern over the ruling's impact, such concerns can be addressed appropriately at that time through narrowly crafted legislation during the 2011 Legislative Session. Any legislative action taken at that time must not impinge in any way on the Court ordered remedy as to SNWA's 1989 applications or the ruling's applicability to the limited set of applications that were for interbasin transfers, were protested, and which were filed more than a year prior to the 2003 legislative amendments and were not acted on within one year of being filed.

While GBWN does not believe any legislative limitation of the Supreme Court's ruling in this case is necessary or warranted, GBWN might be willing to agree to a limitation that is carefully crafted to ensure that the ruling's applicability to SNWA's 1989 applications is preserved and that the ruling is applied in a manner that remedies the constitutional concerns raised by the petitioners in this case. This position seems to be consistent with the position advanced by the State Engineer in the petition for rehearing that he has filed with the Supreme Court in this case.

Sincerely,

A handwritten signature in black ink, appearing to read 'Simeon Herskovits', with a stylized flourish at the end.

Simeon Herskovits
Attorney for the Great Basin Water Network